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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY C. MCKETTRICK, Defendant and Appellant.	B173769 (Los Angeles County Super. Ct. No. KA063385)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Lance E. Winters, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Timothy C. McKettrick, appeals from his convictions for: felony petty theft (Pen. Code, § 666); evading an officer with willful disregard for the safety of person or property (Veh. Code, § 2800.2, subd. (a)); and unlawful driving or taking of a vehicle. (Veh. Code, § 10851, subd. (a).) The trial court also found that defendant was previously convicted of a serious felony and served a prior prison term. (Pen. Code, §§ 667, subds. (b)–(i), 667.5, subd. (b), 1170.12.) Defendant argues the trial court improperly: instructed the jury regarding the statutory presumption of "willful or wanton disregard"; imposed the upper term based upon factors in aggravation not found by the jury; and failed to stay the joyriding count pursuant to Penal Code section 654, subdivision (a). We reject these contentions and affirm the judgment.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) In August 2003, Daniel Ochoa's white Buick Century automobile was stolen. When the car was recovered by police a few weeks later, Mr. Ochoa noticed: the paint had been sanded; the front and trunk of the car was damaged; and the ignition switch was gone. Mr. Ochoa did not know defendant. Mr. Ochoa did not give defendant permission to take or drive the white Buick Century.

On September 6, 2003, Los Angeles County Deputy Sheriff Joseph Dominguez was on duty in a patrol car. Deputy Dominguez received a radio broadcast regarding someone possibly siphoning gasoline from a rental truck. A subsequent broadcast revealed that the individual left the area in a white sedan. That white car was later determined to be Mr. Ochoa's stolen Buick Century. Chuck Bitar, a local resident, had detected the smell of gas. Mr. Bitar saw a hose coming from the gas tank of a parked rental truck into a can. Mr. Bitar telephoned the sheriff's department. Approximately 10 or 15 minutes later, Mr. Bitar saw someone drive away from the area in a white sedan.

When Deputy Dominguez arrived in response to a radio broadcast, he saw a white sedan pull out of a parking lot behind the gas station near the location of the rental trucks. Deputy Dominguez followed the car. Thereafter, Deputy Dominguez pulled the patrol

car alongside the white car. Deputy Dominguez shined a white light into the car. Defendant, who was driving the car, looked in Deputy Dominguez's direction for 7 to 10 seconds. Defendant was not wearing a shirt. Deputy Dominguez radioed Deputy Patrick Bohnert. Deputy Bohnert was directly behind Deputy Dominguez's patrol car. Deputy Dominguez, who was in uniform, indicated over the radio he intended to initiate a traffic stop. Deputy Dominguez's patrol car was a typical sheriff's cruiser with lights and a siren. Deputy Dominguez activated his three overhead lights as he pulled behind the white sedan. The red light faced forward. Defendant drove approximately 7 to 10 feet and came to a rolling stop. However, defendant then accelerated. Deputy Dominguez turned on his air horn siren. Defendant sped away. Defendant made two right turns without signaling and failed to stop at two stop signs. Defendant's car reached speeds of approximately 65 miles per hour, which was in excess of the posted speed limit. Deputy Dominguez continued to use his air horn and forward-facing lights. Defendant turned again after he failed to stop at another stop sign. Deputy Dominguez was advised by the watch commander to cancel the pursuit. Defendant drove into the parking lot of a nearby park. Deputy Dominguez turned off his lights and sirens. Deputy Dominguez followed defendant into the park. Defendant drove onto the grass some 650 feet before hitting a gate.

In response to another radio broadcast, Deputy Dominguez drove to the northwest corner of the park. Deputy Bohnert and a sergeant, who had responded to the pursuit, arrived at the park. Deputy Bohnert saw defendant run toward a nearby apartment complex. Deputy Dominguez stopped his patrol car. Deputy Dominguez then saw defendant "pop up" behind a wall. Defendant was later found hiding in an ivy area near a residence. Defendant wore no shirt. Defendant appeared very lethargic and tired when he was arrested. Defendant's clothing, shoes, and socks were wet. Defendant had several open scratches and cuts. Three five-gallon gas cans and a siphoning hose were in the rear seat of the white sedan, which defendant had driven.

First, defendant argues: "[Vehicle Code section 2800.2] creates a mandatory presumption requiring jurors to find the ultimate fact of willful or wanton disregard for the safety of persons or property from the predicate facts of three Vehicle Code violations, including minor traffic infractions, or from damage to property, howsoever caused. The trial court's instruction on this mandatory presumption violated [defendant's] Fourteenth Amendment rights because neither of the predicate facts compel an inference of willful or wanton disregard." Vehicle Code section 2800.2 provides in pertinent part: "(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished . . . . [¶] (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs." CALJIC No. 12.85, as given in this case, provides in pertinent part: "A willful or wanton disregard for the safety of persons or property also includes, but is not limited to: driving while fleeing or attempting to elude a pursuing peace officer, during which time the person driving commits three or more Vehicle Code violations such as violations of Vehicle Code section 22450 or 22350 or damage to property occurs."

A defendant's right to due process is violated where an instruction reduces the prosecution's burden of proving every element of an offense beyond a reasonable doubt. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524; *People v. Roder* (1983) 33 Cal.3d 491, 504.) Moreover, the Court of Appeal has explained: "'A mandatory presumption is one that tells the trier of fact that it *must* assume the existence of the elemental fact from proof of the basic fact. [Citations.] The prosecution may not rely on a mandatory presumption unless it is accurate. There must be a '"rational connection"' between the basic fact proved and the ultimate fact presumed [citation] and "the fact proved [must be]

sufficient to support the inference of guilt beyond a reasonable doubt." [Citations.]' [Citation.]" (*People v. Pinkston* (2003) 112 Cal.App.4th 387, 392.)

We agree with the holdings of our colleagues in Division Three of this appellate district in *Pinkston*: "Subdivision (b) of Vehicle Code section 2800.2 does not state a mandatory presumption. Rather it sets out the Legislature's *definition* of what qualifies as willful and wanton conduct under subdivision (a). Although Vehicle Code section 2800.2 uses the phrase 'willful or wanton disregard for the safety of persons or property' to describe an element of reckless evading, the statute defines this element so that it may be satisfied by proof of property damage or by proof that the defendant committed three Vehicle Code violations. Thus, section 2800.2, subdivision (b) establishes a rule of substantive law rather than a presumption apportioning the burden of persuasion concerning certain propositions or varying the duty of coming forward with evidence. [Citation.] In other words, evasive driving during which the defendant commits three or more specified traffic violations *is* a violation of section 2800.2 '*because of the substantive statutory definition of the crime*' rather than because of any presumption. [Citation.] Since there is no presumption, due process is not violated. [Citation.]" (*People v. Pinkston*, *supra*, 112 Cal.App.4th at pp. 392-393, italics in original; see *People v. McCall* (2004) 32 Cal.4th 175, 188-191 [Health & Safety Code, §11383, subdivision (f), prohibiting the possession of chemicals essential to manufacturing methamphetamine created a rule of substantive law rather than a mandatory rebuttable presumption]; *People v. Bransford* (1994) 8 Cal.4th 885, 892-893 [Vehicle Code section proscribing driving with prohibited blood-alcohol concentration defines the substantive offense rather than presumes the driver was intoxicated or under the influence].) Vehicle Code section 2800.2 and CALJIC No. 12.85 do not set forth unconstitutional mandatory presumptions.

Second, defendant argues that the trial court improperly relied on aggravating factors in imposing the upper term as to counts 1 and 3 without according him a jury trial as required by *Blakely v. Washington* (2004) 542 U.S. ___, ___ [124 S.Ct. 2531,

2536-2537]. This contention was not asserted in the trial court. Therefore, all of defendant's *Blakely* based federal constitutional contentions have been forfeited. (*United States v. Cotton* (2002) 535 U.S. 625, 631-634; *People v. Sample* (2004) 122 Cal.App.4th 206, 216-221, 225.) In any event, there is no possibility of a different result had the matter been submitted to a jury. Upper term treatment was a foreordained reality. The trial court imposed the high term for the following reasons: "In imposing [the] high term, the court again is taking into consideration the defendant's prior convictions as an adult [which] are numerous. Moreover, defendant's conduct indicates he is a serious danger to others and will impose a substantial danger to others if not incarcerated. The court finds there were no factors in mitigation in this matter, and for that reason the high term is selected." In the face of federal constitutional error of the type at issue here, we apply the *Chapman v. California* (1967) 386 U.S. 18, 22 harmless error test. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *Summerlin v. Stewart* (9th Cir. 2003) 341 F.3d 1082, 1121; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079-1080, fn. 9.) Here, there were no mitigating factors. The trial court relied in part on defendant's extensive record, 10 prior convictions, which is not subject to the federal constitutional jury right. (*Blakely v. Washington*, *supra*, 542 U.S. at p. __ [124 S.Ct. at p. 2536]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) In the absence of any mitigating circumstances, the trial court was virtually required to impose the upper term. (See Cal. Rules of Court, rule 4.420(b) ["Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation"]; *People v. Osband*, *supra*, 13 Cal.4th at pp. 728-729; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263-1264; *People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615.) Since the upper term was effectively required under these circumstances, any *Blakely* error was harmless.

Third, defendant argues the trial court improperly imposed a concurrent sentence as to count 3, unlawful driving of an automobile, rather than staying it pursuant to Penal Code[1] section 654, subdivision (a). Defendant argues that his intent in committing felony evading as charged in count 1 and unlawful driving of a vehicle as charged in count 3 was the same—to "get away with stolen gasoline." Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." We review the trial court's order imposing multiple sentences in the context of a section 654, subdivision (a) question for substantial evidence. (*People v. Osband, supra,* 13 Cal.4th at pp. 730-731; *People v. Downey* (2000) 82 Cal.App.4th 899, 917; *People v. Oseguera* (1993) 20 Cal.App.4th 290, 294-295; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) In conducting the substantial evidence analysis we view the facts in the following fashion: "We must 'view the evidence in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.)" (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698; see also *People v. Green* (1996) 50 Cal.App.4th 1076, 1085.) "Whether a course of conduct is indivisible depends upon the intent and objective of the actor." (*People v. Perez* (1979) 23 Cal.3d 545, 551; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Substantial evidence supports a finding of a *divisible* course of conduct based upon defendant's intent and multiple objectives.

The trial court reasonably could have concluded defendant had the intent to both drive or take the car without the owner's permission and later to evade a pursuing deputy sheriff. In *People v. Trotter* (1992) 7 Cal.App.4th 363, 366-368, our colleagues in the

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Court of Appeal for the Fourth Appellate District found evidence sufficient to establish that a defendant who fired three separate shots from a commandeered taxi at a pursuing officer had separate intents for each shot fired. In *Trotter*, citing *People v. Harrison* (1989) 48 Cal.3d 321, 337-338, the Court of Appeal held: "'No purpose is to be served under section 654 by distinguishing between defendants based solely upon the type *or* sequence of their offenses. . . . [I]t is defendant's intent to commit a number of separate base criminal acts upon his victim, and not the precise code section under which he is thereafter convicted, which renders section 654 inapplicable. (*Ibid.*) [¶] The purpose behind section 654 is 'to insure that a defendant's punishment will be commensurate with his culpability. [Citation.]' (*People v. Perez*[, *supra*,] 23 Cal.3d [at p.] 552 [].) Defendant's conduct became more egregious with each successive shot. Each shot posed a separate and distinct risk to Bledsoe and nearby freeway drivers. To find section 654 applicable to these facts would violate the very purpose for the statute's existence. [¶] Furthermore, this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable. '[D]efendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.' (*People v. Harrison*, *supra*, 48 Cal.3d at p. 338.)" (*People v. Trotter*, *supra*, 7 Cal.App.4th at pp. 367-368, fn. omitted; accord, *In re Michael B.* (1980) 28 Cal.3d 548, 556-557 [taking an automobile and driving without a license are separate divisible offenses].)

Likewise in this case, each offense committed by defendant demonstrated a separate and distinct intent. Defendant admittedly drove the stolen car away to complete the theft of the gasoline. It was not until some time thereafter that defendant formed a separate intent to evade the pursuing deputies, which caused a high-speed chase endangering all in its path. In *Trotter,* the court described the act of shooting at the same pursing police officer in the context of section 654, subdivision (a) as follows: "All three

shots were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable." (*People v. Trotter, supra,* 7 Cal.App.4th at p. 368; see *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255-1256 [theft of victim's key and subsequent burglary constituted divisible offenses subject to separate sentences]; *People v. Surdi* (1995) 35 Cal.App.4th 685, 688-690 [defendant properly punished for kidnapping and mayhem based upon separate intent].) The same is true in this case. The trial court could reasonably conclude separate volitional acts separated by brief periods of time were committed by defendant. The trial court could therefore properly impose separate sentences as to each count.

The judgment is affirmed.

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TURNER, P.J.

I concur:

GRIGNON, J.

MOSK, J., Concurring

I concur.

Presiding Justice Klein makes a persuasive argument in her dissent in *People v. Pinkston* (2003) 112 Cal.App.4th 387, 395. It does seem strange that the Legislature would consider certain conduct to constitute a "[w]illful or wanton disregard for the safety of persons or property . . ." (Veh. Code, § 2800.2, subd. (a)) when the conduct otherwise would not be considered "willful or wanton." But that is what the Legislature seems to have done. This is an issue that should be resolved by the Supreme Court or the Legislature.

I disagree with the majority's application of *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). Contrary to the majority, I agree with the many decisions that there was no forfeiture. (*People v. Juarez* (Nov. 16, 2004 B165580) __ Cal.App.4th __ [2004 WL 2592776]; *People v. Picado* (Nov. 5, 2004 A102251) __ Cal.App.4th __ [2004 WL 2491804]; *People v. George* (2004) 122 Cal.App.4th 419; *People v. Lemus* (2004) 122 Cal.App.4th 614.) I believe, as the court said in *Juarez*, that *Blakely* applies to the sentencing scheme and that a *Blakely* error is subject to the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24). I do not agree with the suggestion by the majority that, "In the absence of any mitigating circumstances, the trial court was virtually required to impose the upper term." Nothing supports that statement. If the "circumstances in aggravation outweigh the

circumstances in mitigation," the "[s]election of the upper term is justified" (Cal. Rules of Court, rule 4.420, subd. (b)), not compelled.

Nevertheless, here, the trial court, in justifying the upper term relied heavily on defendants criminal record, a factor that does not require a jury trial. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 496.) The only additional factor to which the trial court referred was that "Defendants conduct indicates that he is a serious danger to others and will pose a substantial danger to others if not incarcerated." The trial court found no factors in mitigation. Based on the trial court's comments, the *Blakely* error was harmless beyond a reasonable doubt.

Accordingly, I concur in the judgment.

MOSK, J.